

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
CAM INDUSTRIES, INC.

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 86-32

ORDER GRANTING  
APPELLANT'S MOTION  
FOR SUMMARY JUDGMENT

THIS MATTER, the appeal of a hazardous waste generator's fee assessment, came on for hearing on the parties cross motions for summary judgment, on May 5, 1986 in Lacey, Washington. Sitting as the Board were Wick Dufford (presiding), Lawrence J. Faulk and Gayle Rothrock. Without objection, testimony at that time was heard from appellant's vice-president for finance. David Tarshes, Attorney-at-Law, represented CAM Industries, Inc.; Jeffrey Goltz, Assistant Attorney General, represented the Department of Ecology.

The Board has considered the testimony and oral argument and the

1 following materials from the record:

2 1.) Memorandum of Respondent Department of Ecology in Support of  
3 Motion for Summary Judgment.

4 2.) Affidavit of Karen Michelena, with five exhibits attached:

- 5 a) Exhibit 1 - Generator Annual Dangerous Waste Report, CAM  
Industries, 2/27/85
- 6 b) Exhibit 2 - Hazardous Waste Generator Assessment, Annual  
1984, CAM Industries
- 7 c) Exhibit 3 - Request for Waiver of Fee, CAM Industries
- 8 d) Exhibit 4 - Letter, Revenue to Ecology, dated July 5, 1985
- 9 e) Exhibit 5 - Letter, Ecology to CAM Industries, January  
24, 1986, attaching Hazardous Waste Generator Assessment,  
Annual 1984, Cam Industries, reassessment billing.

10 3.) Memorandum of appellant CAM Industries, Inc. in Support of  
1 Cross-Motion for Summary Judgment.

2 4.) Affidavit of N.W. Van, with three exhibits attached:

- 13 a) Exhibit A - Hazardous Waste Generator Assessment, Annual  
1984, CAM Industries, reassessment billing
- 14 b) Letter, CAM Industries to Ecology, dated February 19, 1985
- 5 c) Exhibit C - Combined Excise Tax Returns, CAM Industries,  
1984 (12 monthly returns)

16 5.) Memorandum of Department of Ecology in Response to Appellant  
7 CAM Industries' Motion for Summary Judgment.

18 FACTS

9 On the record and presentations made, the Board finds no material  
0 facts to be in dispute. The following are undisputed:

21 1.) CAM Industries engages in Washington and in other states in  
22 the business of manufacturing and selling fabricated steel items,  
23 including electrical, pneumatic, hydraulic and plumbing components.

24 2.) CAM is a generator of hazardous wastes in the state subject  
5 to an annual fee assessed by the Department of Ecology, but collected

1 by the Department of Revenue.

2 3.) On April 30, 1985, Ecology assessed CAM a fee of \$6,750 for  
3 the generation of hazardous waste for calendar year 1984. The  
4 assessment placed CAM in risk class G-5, and relied on a figure for  
5 CAM's annual gross income of more than \$10 million provided by the  
6 Department of Revenue.

7 4.) On June 14, 1985, CAM filed with Ecology a Request for Waiver  
8 of Fee, on a form provided by Ecology. The returned form showed a  
9 check alongside the following pre-printed entry as the basis for the  
10 waiver request: "The annual gross income (AGI) shown on my fee  
11 statement is incorrect."

12 5.) Ecology contacted Revenue to confirm CAM's 1984 annual gross  
13 income. Revenue responded with a figure matching that initially used  
14 to compute CAM's fee.

15 6.) On January 24, 1986, Ecology denied CAM's Request for Waiver  
16 of Fee, and forwarded to CAM a "reassessment billing" identical in fee  
17 to its initial assessment but setting forth new due dates.

18 7.) The annual gross income figure on which Ecology based its fee  
19 for 1984 included CAM's income from activities outside the State of  
20 Washington as well as within the state.

21 8.) CAM's 1984 gross income attributable to the company's  
22 activities within the State of Washington only was approximately \$9.3  
23 million.

#### 24 ISSUES

25 CAM argues that the fee imposed on a generator under RCW  
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1 75.105A.030 must be based on the annual gross income attributable to  
2 the business's activities within the state of Washington.

3 Ecology contends: 1) that this Board should decline to entertain  
4 the issue CAM raises, and somehow, provide for it to be answered by  
5 the Department of Revenue; 2) that Chapter 70.105A RCW does not limit  
6 annual gross income for the purposes of the fee in question to income  
7 attributable to a business's in-state activities.

#### 8 DISCUSSION

9 The statutory generator's fee under consideration is the product  
10 of two basic considerations: 1) annual gross income and 2) the risk  
11 involved for the hazardous wastes generated. RCW 70.105A.030(2)  
12 provides for graduating the fee by reference to annual gross income as  
13 follows:

14 (a) For annual gross income not in excess of one  
15 million dollars, a fee of not more than one hundred  
16 fifty dollars;

17 (b) For annual gross income in excess of one  
18 million dollars but not exceeding ten million  
19 dollars, a fee of not more than seven hundred fifty  
20 dollars;

21 (c) For annual gross income in excess of ten  
22 million dollars, a fee of not more than seven  
23 thousand five hundred dollars.

24 The same statutory subsection directs Ecology to further graduate the  
25 fee through a fee schedule adopted as a regulation which incorporates  
26 criteria relating to the quantity of hazardous waste generated and the  
27 health and environmental risks associated with the waste.

28 Ecology has complied with this directive in chapter 173-305 WAC.  
29 Seven risk classes are established in ascending order of riskiness.

1 WAC 173-305-030(3)(b). The fee schedule itself is set forth in a  
2 matrix appearing under WAC 173-305-040(1)(a).

3 Risk	4 Class	\$1,000,000.00	\$1,000,000.01	more than
		and less	to	\$10,000,000.00
			\$ 10,000,000	
5	G1	\$15.00	\$100.00	\$1,000.00
	G2	\$40.00	\$300.00	\$3,000.00
6	G3	\$65.00	\$500.00	\$5,000.00
	G4	\$90.00	\$600.00	\$6,000.00
7	G5	\$115.00	\$675.00	\$6,750.00
	G6	\$140.00	\$725.00	\$7,250.00
8	G7	\$150.00	\$750.00	\$7,500.00

9 The significance of whether CAM's AGI for fee purposes is to be taken  
10 from total income or only from income attributable to its activities  
11 in Washington is obvious. If the former, the fee is \$6,750. If the  
12 latter, it is \$675.

13 In approaching this case, the Board is mindful that the Department  
14 of Revenue and the Board of Tax Appeals are the sources to look to for  
15 expertise in tax matters. We do not, however, regard resolution of  
16 this controversy over fee setting as a matter requiring that kind of  
17 expertise.

18 The substantive issue is essentially an ordinary question of  
19 statutory construction. We are not concerned with whether any  
20 particular of CAM's tax return is accurate or properly included within  
21 the category where it belongs. The question is simply which of two  
22 uncontested sums should be used as the basis for AGI, as that term is  
23 used in chapter 70.105A RCW.

24 We are emboldened in tackling this issue by the knowledge that  
25 Ecology, itself an entity without obvious expertise in taxation, has

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1 seen fit to interpret the statute on the very point it asks us to  
2 duck. Indeed, our conclusion rests, in substantial part, on our  
3 deference to the interpretation of the statute which Ecology has made.

4 1. AGI for purposes of the generator's fee should be based on AGI  
5 attributable to the entity's business in the state.

6 The statute first defines AGI without reference to any geographic  
7 limitation. RCW 70.105A.020(8) But the section establishing the  
8 generator's fee adds to the definition, and in so doing suggests the  
9 in-state limitation on AGI for which CAM argues. RCW 70.105A.030(3),  
10 provides that the AGI of businesses taxable under RCW 82.04.290 "and  
11 maintaining places of business within and without this state" shall be  
12 apportioned pursuant to RCW 82.04.460. The latter section states that  
13 tax liability for such businesses shall be derived by apportioning "to  
14 this state that portion of [its] gross income which is derived from  
15 services rendered within this state."

16 The language of RCW 70.105A.030(3) again seems to contemplate an  
17 in-state activities restriction on AGI where it speaks to apportioning  
18 the hazardous waste fee among several sites a business may maintain  
19 within Washington state. The overall AGI number to be used in  
20 dividing the fee among specific sites is "[t]he total annual gross  
1 income of the business taxable in this state under chapters 82.04 and  
2 82.16 RCW." Chapter 82.04 is Washington's Business and Occupation tax  
3 which is limited in scope by the scope of business activities in this  
4 state. See RCW 82.04.4286; Department of Revenue v. J.C. Penney Co.,  
5 96 Wn.2d 38, 633 P.2d 870(1981).

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1 An agency's regulations must "fill in the gaps" where necessary to  
2 the effectuation of a general statutory scheme. Hama Hama Company v.  
3 Shorelines Hearings Board, 85 Wn.2d 441, 536 P.2d 157(1975). Ecology  
4 has done this in its implementing regulation. WAC 173-305-010 states  
5 that it is Ecology which assesses the fees provided for in chapter  
6 70.105A RCW. As to generator fees this is accomplished by first  
7 asking Revenue to provide an AGI number. Under WAC 173-305-030(2)(a):

8 The AGI obtained from the department of revenue for  
9 persons whose business activities earn income  
10 without as well as within the state will reflect  
the portion of total AGI attributable to activities  
within the state. (emphasis added)

11 To us this appears a clear and unambiguous interpretation, reasonably  
12 consistent with the statute being implemented. Weyerhaeuser Co. v.  
13 Department of Ecology, 86 Wn. 2d 310, 545 P.2d 5 (1976).

14 Later on in WAC 173-305-030(2)(b)(11) where Ecology includes a  
15 formula for apportioning the fee among multiple in-state sites of a  
16 business, the overall AGI figure used is supposed to equal "total AGI  
17 attributable to the person's business in this state." Again Ecology  
18 has clearly chosen an in-state activities limitation. Such regulatory  
19 provisions, the product of Ecology's own reading of the statute, are  
20 presumed to be valid and are entitled to considerable deference.  
21 Kaiser Aluminum v. Department of Ecology, 32 Wn. App. 399, 647 P.2d  
22 551 (1982).

23 Naturally, Ecology does not here directly attack its own  
24 regulations. Faced with the inconvenience of their explicit language,  
25 the agency argues that it is powerless to look behind the AGI figure

1 it is given by Revenue. Nothing in the statute or the rules supports  
2 this assertion of powerlessness.

3 The statute simply provides that Revenue will collect the fee. In  
4 so doing it is empowered to use some of the collection mechanisms of  
5 chapter 82.32 RCW. In addition, it is empowered to adjust the fee "if  
6 the annual gross income of the business . . . is finally determined  
7 to be greater or less than that reported to the department of revenue  
8 for the year in question." RCW 70.105A.030(9). Here we do not deal  
9 with any change in what was reported to Revenue. We have no problem  
10 with the numbers CAM provided. We deal rather with the basic question  
11 of where, within information already reported, the label AGI is to be  
12 affixed for the purposes of the statute. The statute gives Revenue no  
13 role in this regard.

14 Furthermore, Ecology's regulations do not tie its own hands  
15 concerning the AGI figure provided by Revenue. The section on  
16 coordination between Ecology and Revenue merely states that "figures  
17 on annual gross income for businesses will be obtained from revenue."  
18 WAC 173-305-050(3). It does not say that Ecology must abide by  
19 whatever definition of AGI Revenue has chosen sub silentio to use in  
20 responding to Ecology's request.

21 Ecology has an affirmative duty to abide by its own regulations.  
22 Ritter v. Hospital Commissioners, 96 Wn. 2d 503 (1981). Here where  
23 these regulations specify that Revenue is to provide an AGI figure  
24 which reflects "the portion of total AGI attributable to activities  
25 within the state," Ecology cannot take refuge in the notion that it



1 has no choice but to accept whatever Revenue tells it. Ecology has an  
2 obligation to insure that Revenue provides it with a number for AGI  
3 which is consistent with the rules Ecology has adopted.

4 In short, we conclude that AGI for the purposes of the generator's  
5 fee should be based on AGI attributable to the entity's business in  
6 the state. We reach this result because we are persuaded that  
7 Ecology's interpretation of the statute as expressed in its  
8 regulations, is consistent with the underlying legislation.

9 2. This Board has the authority to decide this case.

10 RCW 70.105A.070 provides:

11 Any person aggrieved by a determination of the  
12 department of ecology pertaining to the fee  
13 imposed under RCW 70.105A.030(1) . . . may  
obtain review thereof by the pollution control  
hearings board . . . (emphasis added)

14 This section provides the only means for reviewing fee  
15 determinations explicitly provided in the statute. We believe, under  
16 the facts at hand, that it confers jurisdiction on this Board to  
17 entertain the issue raised.

18 This is a case about a fee which, by virtue of Ecology's  
19 regulations, that agency is purporting to have assessed. The issue  
20 was initially raised by a Request for Waiver of Fee filed with Ecology  
21 on a form provided by Ecology, containing as a pre-printed ground for  
22 challenge the assertion that the AGI on the fee statement is incorrect.

23 What the case comes down to is whether the AGI which was the basis  
24 for the fee is consistent with the use of that term under Ecology's  
25 regulations. The AGI figure provided by Revenue included out-of-state

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1 as well as in-state activities. There is no factual issue about  
2 this. Accordingly, we conclude that Ecology's acceptance of that  
3 figure represented "a determination of the department of ecology  
4 pertaining to the fee imposed." We have jurisdiction to review such  
5 determinations.

ORDER

On the basis of the foregoing, the Board renders judgment in favor of appellant CAM Industries, Inc., reverses the denial of the request for waiver, and remands the matter to the Department of Ecology for recomputation and reassessment of the fee in a manner consistent with this Order.

DONE this 27<sup>th</sup> of June, 1986.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford  
WICK DUFFORD, Lawyer Member

Lawrence J. Faulk 6/27/86  
LAWRENCE J. FAULK, Chairman

Gayle Rothrock  
GAYLE ROTHROCK, Vice-Chairman